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7 *Recording Arts & Sciences, Inc.*

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 DARRYL PAYNE,

12 Plaintiff,

13 v.

14 BARRY MANILOW, an individual;
15 STILETTO ENTERTAINMENT, a
business entity; GARRY C. KEIF, an
16 individual; JUDY GARLAND HEIRS'
TRUST, a business entity; AEG LIVE,
17 LLC, a limited liability company; AEG
LIVE PRODUCTIONS, LLC, a limited
18 liability company; CLIVE DAVIS, an
individual; NATIONAL ACADEMY OF
19 RECORDING ARTS & SCIENCES,
INC., a Delaware nonstock corporation;
20 LIZA MINELLI, an individual; LORNA
LUFT, an individual; JOEY LUFT, an
21 individual; MADISON SQUARE
GARDEN COMPANY, a Delaware
22 corporation; LIVE NATION
ENTERTAINMENT, INC., a Delaware
23 corporation; and DOE 10, inclusive,

24 Defendants.
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Case No. 2:18-cv-03413-PSG-PLA

**DEFENDANT NATIONAL
ACADEMY OF RECORDING ARTS
& SCIENCES, INC.'S REQUEST
FOR JUDICIAL NOTICE IN
SUPPORT OF ITS MOTION TO
DISMISS FOURTH AMENDED
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Date: February 25, 2019
Time: 1:30 p.m.
Courtroom: 6A
Judicial Officer: Hon. Philip S.
Gutierrez

REQUEST FOR JUDICIAL NOTICE

Defendant National Academy of Recording Arts & Sciences, Inc. (“the Recording Academy”) requests that the Court take judicial notice of the following documents offered in support of its motion to dismiss *with prejudice* the Fourth Amended Complaint of Plaintiff Darryl Payne as against the Recording Academy pursuant to Rule 12(b)(6):

EXHIBIT A: “Barry Manilow Gives Surprise Performance at Clive Davis’ Pre-Grammy Party Days After Hospitalization,” published February 15, 2016 at abcnewsradioonline.com.

EXHIBIT B: “Barry Manilow Gives Surprise Performance at Pre-GRAMMYs Party Three Days After Hospitalization,” published February 15, 2016 at etonline.com.

EXHIBIT C: “Barry Manilow Makes Surprise Return to Stage at Clive Davis’ Pre-Grammy Gala,” published February 15, 2016 at billboard.com.

EXHIBIT D: “Barry Manilow Makes Surprise Appearance, Performing at Clive Davis’ Grammy Bash Just Days After Emergency Surgery,” published February 15, 2016 at people.com.

Respectfully Submitted,

Dated: December 14, 2018

PROSKAUER ROSE LLP

By: /s/ Jennifer L. Jones

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*Attorneys for National Academy of
Recording Arts & Sciences, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Federal Rule of Evidence 201(b) authorizes courts to take judicial notice of
3 facts that are “not subject to reasonable dispute” and that are “capable of accurate
4 and ready determination by resort to sources whose accuracy cannot be reasonably
5 questioned.” Exhibits A through D meet this standard.

6 The documents the Recording Academy asks the Court to take judicial
7 notice of are news articles from established entertainment online resources—ABC
8 News, Billboard, ET, and People—each of which evidences the same fact: it was
9 not in the public realm at the time that Mr. Manilow would appear at the Clive
10 Davis Pre-GRAMMY® Gala in February 2016 because Mr. Manilow’s
11 performance was a “surprise” and “unexpected”. *See* Ex. A at 1 (“We don’t know
12 if it’s a miracle, but **Barry Manilow** unexpectedly showed up to perform at music
13 mogul **Clive Davis**’ annual pre-Grammy party on Sunday, February 14”); Ex.
14 B at 1 (*see* headline, referring to Mr. Manilow’s “Surprise Performance at Pre-
15 GRAMMYs Party”); Ex. C at 2 (“**Barry Manilow** made a surprise return to the
16 stage for Clive Davis’ pre-Grammys party in L.A. Sunday night (Feb. 14)”);
17 and Ex. D. at 2 (“ . . . Barry Manilow hit up Clive Davis’ annual pre-Grammys bash
18 for a surprise performance”).

19 Judicial notice of news articles is appropriate when they provide evidence to
20 “indicate what was in the public realm at the time” *Von Saher v. Norton*
21 *Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (noting that,
22 while courts are not permitted to take notice of news articles for their truth, courts
23 *can* take notice of news articles to “indicate what was in the public realm at the
24 time” and taking judicial notice of news articles on that basis). Thus, this Court
25 can consider that the public did not know in advance that Mr. Manilow would
26 appear at the February 14, 2016 Clive Davis Pre-GRAMMY Gala.

27 For the foregoing reasons, Exhibits A through D may be considered by the
28 Court in ruling on the motion, and the Recording Academy respectfully requests

1 that the Court grant this Request for Judicial Notice.

2 Respectfully Submitted,

3 Dated: December 14, 2018

PROSKAUER ROSE LLP

4 By: /s/ Jennifer L. Jones

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